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formance of his duty offers it for probate, his costs are taxed against the estate.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 768.]

**9. Wills (§ 404\*)—Probate—Costs—Statute.**—Where the beneficiary and not the executor was the active litigant who sought probate of an alleged will, the contest being between him as a beneficiary and the heirs at law, the heirs, who prevailed below, were properly awarded their costs against the beneficiary, under Code 1904, § 3545, declaring that the party for whom final judgment is given, whether plaintiff or defendant, shall recover his costs against the opposite party.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 768.]

Error to Circuit Court, Albemarle County.

Proceedings for probate of will by L. M. Bowen's executor and H. A. Sandridge, contested by T. F. Bowen and others. To review judgment against the will, proponents bring error. Judgment affirmed.

*Allen & Walsh* and *E. O. McCue*, all of Charlottesville, for the plaintiffs in error.

*Frank Gilmer*, of Charlottesville, and *Chas. A. Hammer* and *D. O. Dechert*, both of Harrisonburg, for defendant in error.

#### BARE v. COMMONWEALTH.

Nov. 15, 1917.

[94 S. E. 168.]

**1. Criminal Law (§ 823 (1)\*)—Instructions—Repetition.**—Defendant's requested instructions, fully covered by instructions given by the court at the instance of the commonwealth, were properly refused, it being objectionable to multiply instructions which repeat the same propositions of law in different terms.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 742.]

**2. Criminal Law (§ 636 (1)\*)—Necessity for Plea—Arraignment—Statute.**—If accused is absent, no arraignment of him can be made, but, in misdemeanor cases, under Code 1904, § 4012, providing that in prosecutions for misdemeanors, after a summons has been executed ten days before the first day of the term of court, or if accused was admitted to bail and made default, the court may award a *capias*, or proceed to trial as if accused had appeared and pleaded not guilty, the court may proceed to trial as if accused had appeared and pleaded not guilty, since if he desires to make defense, and goes to trial without pleading, he waives his right.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 37.]

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

**3. Criminal Law (§ 281 (1)\*)—Arraignment—Necessity.**—Though arraignment is necessary in felony cases, it is not necessary in misdemeanors.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 37, 39, 63.]

**4. Intoxicating Liquors (§ 231\*)—Criminal Prosecution—Evidence—Statute.**—Under the Mapp prohibition law (Acts 1916, c. 146, § 30½), making it the duty of the state commissioner of agriculture on the written request of the proper official to cause an analysis to be made of any mixture supposed to contain ardent spirits, and to return to the officer the certificate of the chemist making the analysis, though only the certificate of the chemist is made evidence by the statute, it is not evidence unless the commissioner of agriculture caused the analysis to be made, nor unless he also returned the chemist's certificate to the officer who requested the analysis, so that, in a prosecution for dispensing cider, the commissioner's letter, returning the state chemist's certificate of analysis to the officer, was evidence, and so much of it as appeared above the commissioner's signature not to be disregarded, though it was dated December 5th, while the date of the affidavit of the chemist was December 15th, a variance which should have been explained.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 36.]

**5. Words and Phrases—"Curtilage."**—The "curtilage" of a dwelling house is a space necessary and convenient, habitually used for family purposes and the carrying on of domestic employment; the yard, garden, or field which is near to and used in connection with the dwelling.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Curtilage.\* For other cases, see 16 Va.-W. Va. Enc. Dig. 348.]

**6. Intoxicating Liquors (§ 137\*)—Manufacture of Cider—"Home"—"Permanent Residence"—Statute.**—In Mapp Prohibition Law, § 8, allowing the manufacture and domestic use of cider from fruit of defendant's own raising "at his home," section 16, prohibiting the giving away of ardent spirits in any place "except in a bona fide home," section 39, permitting the transportation of ardent spirits in small quantities by common carriers, where the consignee makes affidavit that the liquor received is for "his own use in his own home," section 42, referring to a "bona fide home," and section 61, providing that nothing in that act shall prevent one "in his own home" from having and giving to another ardent spirits, the words "at his home" mean anywhere within the curtilage, the cluster of dwelling houses used by the family as a habitation, as defined from time immemorial, and the words "in his own home," "in his home," and "permanent

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

residence of the person and his family," as used in section 61, have substantially the same meaning.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Home.\* For other cases, see 16 Va.-W. Va. Enc. Dig. 728.]

**7. Intoxicating Liquors (§ 238 (6)\*)—Manufacture and Dispensing of Cider—Character of Building as Part of Home—Question for Jury—Statute.**—In a prosecution for unlawfully dispensing cider containing more than 1 per cent. of alcohol, in violation of the Mapp prohibition law, cider having been made by defendant from his own fruit, if there is doubt as to whether the building wherein the cider was given away was part of defendant's bona fide home, the question should be submitted to the jury, to determine from the evidence the question of fact whether such was the case.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 23.]

Error to Circuit Court, Rockingham County.

Calvin Bare was convicted of unlawfully dispensing and giving away cider containing more than 1 per cent. of alcohol, and he brings error. Judgment reversed, and cause remanded for new trial.

*C. R. Winfield*, of Broadway, for plaintiff in error.  
*The Attorney General*, for the Commonwealth.

#### VIRGINIA LUMBER & EXTRACT CO. *v.* O. D. McHENRY LUMBER CO.

Nov. 15. 1917.

[94 S. E. 173.]

**1. Landlord and Tenant (§ 123\*)—Lease of Sawmill—Personalty Included—"Apparatus."**—A lease of land and sawmill plant, together with personal property, including cars, engines, machinery, and "apparatus" of every kind and character then or thereafter placed on the real estate, covered the entire lumber plant, entitling lessee to locomotive, logging cars, tools, implements, and appliances used in operating the plant, furniture, tools, and equipment used in camps, shops, barns, office, etc., in use at the time of the lease, but did not include supplies in store for replacement or repairs of machinery and tools, in view of a provision that the lessee should pay for repairs and replacements, nor did it include foodstuffs, provisions, and medicines for employees and horses, nor horses used in hauling and work at the plant.

[Ed. Note.—For other definitions, see Words and Phrases, First

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